



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17
AUGUSTA, MAINE 04333

BOARD ORDER

UNITED STATES SURGICAL CORP.)	APPEAL OF DESIGNATION OF
MALLINCKRODT LLC)	UNCONTROLLED HAZARDOUS
)	SUBSTANCE SITE AND
CONCERNING CHLOR-ALKALI)	ORDER
MANUFACTURING FACILITY)	
ORRINGTON, PENOBSCOT CO, MAINE)	
)	
PROCEEDING UNDER 38 MRSA § 1365)	
UNCONTROLLED HAZARDOUS)	ELEVENTH PROCEDURAL ORDER
SUBSTANCE SITES LAW)	

On December 18, 2009, the Presiding Officer held a pre-hearing conference at the State Planning Office in Augusta in the matter of Mallinckrodt's Appeal of the Designation of Uncontrolled Hazardous Substance Site and Order pertaining to the HoltraChem site in Orrington, Maine. This document summarizes the issues discussed at the conference and sets forth the Presiding Officer's rulings on certain matters pertaining to the proceeding.

Persons present:

Susan Lessard, Board Chair and Presiding Officer	Stacy Ladner, Project Manager, Dept. of Env. Protection (DEP)
Jan McClintock, Assist. Attorney General	Mark Hyland, Director, Bureau of Remediation and Waste Management, DEP
Cynthia Bertocci, Board Exec. Analyst	Jeffrey Talbert, Esq. for Mallinckrodt
Jeff Crawford, Board staff	Sigmund Schutz, Esq. for Mallinckrodt
Terry Hanson, Board Admin. Assistant	Ryan Tipping-Spitz, Maine People's Alliance
Peter LaFond, Assist. Attorney General, for the Commissioner of Env. Protection	Cynthia Mehnert, Esq. for Maine People's Alliance (MPA)
Mary Sauer, Assist. Attorney General, for the Commissioner of Env. Protection	Paul White, Manager, Town of Orrington
	Edmond Bearor, Esq. for Town of Orrington

1. **Motions to Strike Pre-Filed Rebuttal Testimony.** In accordance with the Ninth Procedural Order, the Commissioner and Mallinckrodt filed rebuttal testimony on December 11, 2009. Motions to strike rebuttal testimony were filed by the Commissioner and Mallinckrodt on December 17, 2009. The motions were briefly discussed at the conference. It was determined that responses to the motions to strike would be due on December 23, 2009.
- A. Commissioner's Motion to Strike. By letter dated December 17, 2009, the Commissioner filed a motion to strike Mallinckrodt's request for John James to appear as a rebuttal witness. In his motion, the Commissioner argues that Mr. James has not been involved in any of the substantive

issues pertaining to the HoltraChem site, but has simply coordinated the Commissioner's response to the Freedom of Access Act (FOAA) requests filed with the Department pertaining to the site.

In its response to the Commissioner's motion, Mallinckrodt argues that it believes Mr. James has knowledge of the existence, or lack thereof, of documents relevant to the Commissioner's Order. Mallinckrodt states that it will withdraw its request for Mr. James to appear if "the Department formally stipulates that Stacy Ladner, the project manager for the HoltraChem site, is fully knowledgeable about the existence (or lack thereof) of all documents relevant to site history and the remedy selection process."

Ruling: At the conference, counsel for the Commissioner stated that Stacy Ladner, the Department's project manager for HoltraChem, is the most knowledgeable person within the Department regarding the record in this matter. Given the fact that Mr. James has had no involvement with the HoltraChem site other than coordinating the Department's response to FOAA requests and given the Commissioner's representation that Ms. Ladner is the person most familiar with the Department's record in this matter, the motion to strike Mallinckrodt's request for Mr. James to appear is granted. Mallinckrodt may examine Ms. Ladner on the contents of the Department's record and the existence, or lack thereof, of certain documents.

B. Mallinckrodt's Motion to Strike Certain Rebuttal Testimony of the Commissioner's Witnesses.

In its December 17, 2009 filing, Mallinckrodt raised a number of objections to the Commissioner's pre-filed rebuttal testimony.

- (1) Penobscot River Study. Mallinckrodt argues that several of DEP's witnesses rely upon a report regarding the first phase of a Penobscot River Mercury Study conducted by a panel of scientists pursuant to rulings by the U.S. District Court in *Maine People's Alliance v. HoltraChem Mfg. Co.*, No. 1:00-cv-00069-GC. Mallinckrodt argues that the report pertains to a separate case, the study is not yet complete, underlying data is not currently public, Mallinckrodt cannot meaningfully cross-examine the Commissioner's witnesses without the underlying data, and historic discharges to the Penobscot River are not directly relevant to the current proceeding since the remedial alternatives in this matter are designed to prevent future discharges from the site. Mallinckrodt requests that the Presiding Officer strike the Phase I Report (Exhibit C-3021) and any related testimony and exhibits.¹

The Commissioner responds that the Phase I Report was attached to the Commissioner's Order (C-623)²; Exhibit C-3021 is the "Update to the Phase I Report"³. The Commissioner argues that Exhibit C-3021 (the Update to the Phase I Report) contains numerous appendices that provide underlying data for the report. The Commissioner argues that the "sampling protocols, field notes, or analytical packages" requested by Mallinckrodt do not normally appear in study

¹ Mallinckrodt's motion cites the Phase I Report; Exhibit C-3021; Ms. Ladner's rebuttal testimony pages 8 through 15; Mr. Mower's rebuttal testimony pages 3, 5, 8, 10; and Exhibits C-1053 through C-1079.

² Penobscot River Mercury Study, Phase I of the Study; 2006-2007; Report to Judge Gene Carter, U.S. District Court, (District of Maine) Portland, Maine; January 24, 2008.

³ Penobscot River Mercury Study, Update to the Phase I Report; Report to Judge John Woodcock, U.S. District Court (District of Maine) Bangor, Maine, May 2009.

reports; Mallinckrodt can still evaluate the data and may argue that lack of access to all supporting information diminishes the validity of the report. The Commissioner further argues that information on contamination in the Penobscot River is relevant and is responsive to Mallinckrodt's witness (Dr. Keenan) who compared mercury contamination in the Penobscot River with contamination in other Maine rivers.

Ruling: The Phase I Report was cited in the Commissioner's Order (see Findings of Fact 3 - 5, and Footnote 9). The entire report was submitted with the pre-filed direct testimony (Exhibit C-623). Since the Phase I Report was referenced in the Commissioner's Order and formed, in part, the basis for that Order, it is an integral part of the Order under appeal and, therefore, is not stricken from the record. The Update to the Phase I Report was published after the Commissioner's Order was issued and consequently could not have formed the basis for the Commissioner's Order. However, in accordance with the Eighth Procedural Order, "the record before the Board will include all relevant evidence admitted during the course of the proceeding ... regardless of the date when the evidence was obtained." (Eighth Procedural Order, Section 1, page 4). The Update to the Phase I Report was submitted by the Commissioner to rebut statements by a Mallinckrodt witness regarding contamination to the Penobscot River. As with all such studies and reports, Mallinckrodt is free to cross examine witnesses regarding the unavailability of certain underlying information and to argue that the Phase I Report and Update to the Phase I Report should not be relied on by the Board. Exhibit C-3021 and related testimony is not stricken. The parties are reminded that the Order before the Board on appeal addresses the designation and proposed remedy for the HoltraChem site in Orrington and immediately adjacent river sediments. Additionally, the parties have stipulated to the media protection standards (with the exception of the narrative standard for soils) that the selected remedial alternative must achieve. The Board is not considering remedial actions for the Penobscot River south of the HoltraChem facility in Orrington.

- (2) Town of Orrington's Position Regarding the Remedy and DEP's Permitting of a CAMU (Corrective Action Management Unit). Mallinckrodt objects to Mr. Littell's statement (Littell 2009, paragraphs 35-36) regarding Mallinckrodt's responsibility to obtain permission from the Town to undertake the remedy for the site. Mallinckrodt argues that the Commissioner is impermissibly raising a new issue in rebuttal testimony. Mallinckrodt also objects to Ms. Ladner's statement (Ladner 2009, page 34) in which she asserts that a new onsite landfill is unpermissible; Mallinckrodt argues it constitutes new testimony beyond the scope of rebuttal testimony.

The Commissioner responds that Mr. Littell's and Ms. Ladner's testimony address the implementability of various remedial options, noting issues that were not addressed in Mallinckrodt's analysis.

Ruling: The testimony is responsive to Mallinckrodt's testimony on the ability to implement various remedial alternatives. It is permissible for parties to point out what they believe to be deficiencies in the analysis of the other parties. The testimony is not stricken from the record.

(3) Repetitious Witnesses Addressing Mercury Deposition. Mallinckrodt argues that it is unnecessary and unduly repetitious for seven of the Commissioner's witnesses to submit rebuttal testimony in response to the testimony of Dr. Keenan.

- (a) Testimony of Mr. Hyland, Mr. Littell, Mr. Miller and Mr. Graham regarding regional and Maine specific mercury reduction efforts. Mallinckrodt argues that it is unduly repetitious and is not directly responsive to Dr. Keenan's testimony in that Dr. Keenan did not testify as to whether efforts are being made to reduce mercury contributions to the environment.
- (b) Testimony of Ms. Ladner, Mr. Littell, Mr. Miller and Mr. Graham regarding mercury contributions to the Penobscot River from the HoltraChem facility. Mallinckrodt argues that testimony regarding past contributions from the site are not relevant to the current level of mercury contamination from the site, past contributions of mercury were not addressed by Dr. Keenan, and the testimony relies on information from the Penobscot River Mercury Study which Mallinckrodt has argued should be stricken from the record.
- (c) Testimony of Ms. Ladner, Mr. Littell, and Mr. Mower regarding the level of mercury in the Penobscot River relative to other waterbodies. Mallinckrodt argues that it is unduly repetitious.
- (d) Testimony of Ms. Ladner and Mr. Smith regarding risk to human health. Mallinckrodt argues that it is unduly repetitious and Ms. Ladner does not have relevant expertise to testify on this matter.

The Commissioner responds that Dr. Keenan testifies on multiple topics, the Commissioner's witnesses address various aspects of Dr. Keenan's testimony from their various perspectives, past contributions of mercury to the river from the site are relevant under the Uncontrolled Hazardous Substance Sites Law and bear on the ability of the river to handle additional inputs of mercury, and that some overlap among witnesses is inevitable and in fact can also be found in Mallinckrodt's rebuttal testimony. With respect to Ms. Ladner's comments on the risk assessment, Ms. Ladner criticizes some of Dr. Keenan's assumptions and data but does not offer a risk assessment.

Ruling: With respect to presentation of historic data from the Penobscot River Mercury Study, my ruling is as set forth in Section 1B(1) of this Order. With respect to arguments regarding repetitious testimony, my ruling is as stated in the Tenth Procedural Order; namely, given the extensive history of the site and the number of Department staff from different disciplines who have been assigned to the project over time, there is understandably some overlap in the issues addressed by each witness. The same holds true for rebuttal testimony, with different witnesses responding to various aspects of the testimony of a given witness. The testimony is in the nature of rebuttal in that it opposes evidence or arguments presented by Mallinckrodt's witnesses. Finally, it does not appear that Ms. Ladner holds herself out to be an expert in risk assessment. The testimony is not stricken from the record.

(4) Objections to Testimony by Mark Hyland and Stacy Ladner Pertaining to Bankruptcy.

Mallinckrodt objects to Mr. Hyland's testimony pertaining to bankruptcy (paragraph 14) and Ms. Ladner's reference to bankruptcy (page 25), arguing that it is new and not responsive to any testimony submitted by Mallinckrodt.

The Commissioner responds that Mr. Hyland is expressing a concern regarding the need for financial assurance since other companies have gone bankrupt before completing remediation of a site.

Ruling: The Commissioner does not identify any testimony related to financial assurance or bankruptcy in Mallinckrodt's pre-filed testimony. Nor does the Commissioner identify any other pre-filed testimony offered by Mallinckrodt that Mr. Hyland and Ms. Ladner's testimony purports to respond to. The references to bankruptcy in Mr. Hyland's and Ms. Ladner's testimony are stricken from the record.

(5) Objections to Testimony of Mark Hyland and Commissioner Littell on the State's Mercury Policy and Global Greenhouse Gas Emissions. Mallinckrodt argues that testimony by Mr. Hyland and Commissioner Littell on Maine's policy on mercury is new and not responsive to testimony filed by Mallinckrodt. Mallinckrodt also objects to Commissioner Littell's testimony (Paragraphs 12 through 18) that predicted decreases in greenhouse gas emissions will lead to fewer mercury emissions to the Penobscot River; Mallinckrodt argues that the testimony is broad, hypothetical, misleading and prejudicial to Mallinckrodt.

The Commissioner responds that the testimony rebuts Dr. Keenan's testimony that Maine can do little to address mercury contamination since most of the mercury contamination in Maine is the result of atmospheric deposition.

Ruling: Mercury is the major contaminant of concern at the HoltraChem site. Given this fact and the fact that Mallinckrodt's witness Dr. Keenan has submitted testimony on the relative contributions of various sources of mercury to mercury contamination in Maine, the testimony on Maine's mercury policy is responsive and is not stricken. Mallinckrodt may cross examine Commissioner Littell to determine the basis for his statements regarding greenhouse gas emissions. The testimony is not stricken from the record.

(6) Objections to Testimony of Deborah Stahler Pertaining to Site Redevelopment. Mallinckrodt argues that testimony by Ms. Stahler rebutting the testimony of Mallinckrodt witness Blaine Buck should be stricken because Ms. Stahler has no experience or qualifications pertaining to redevelopment projects.

The Commissioner responds that Ms. Stahler has submitted factual information in response to Mallinckrodt's testimony, and has not offered expert testimony on redevelopment potential.

Ruling: The information responds to testimony of Mallinckrodt's witness. Mallinckrodt may cross-examine the witness, who was not offered as an expert in redevelopment projects, and argue the weight the evidence should receive. The testimony is not stricken from the record.

3. **Sur-Rebuttal.** At the conference Mallinckrodt asked if there would be an opportunity to submit additional documents in response to rebuttal testimony. Mallinckrodt stated that it has filed a motion to strike certain of the Commissioner's rebuttal testimony. If the challenged testimony is allowed, Mallinckrodt stated that it may need to file additional evidence in response to the Commissioner's rebuttal testimony. The Commissioner argued that the pre-filed direct and pre-filed rebuttal testimony required in this proceeding should be sufficient; additional rounds of testimony are not warranted.

Ruling: To the extent a party needs to address the pre-filed rebuttal testimony of another party, the party may weave sur-rebuttal into its testimony at the hearing; however, it is unlikely that additional documentary evidence will be admitted prior to or at the hearing. If a party needs to add an additional witness or additional documentary evidence for sur-rebuttal, the party must request permission to do so in writing, if such a need is known before the commencement of the hearing, or orally if the need arises at the hearing.

4. **Documents for Use in Cross Examination.** Mallinckrodt requested a deadline for submission of demonstratives and other documents to be used in cross-examination.

Ruling: There should not be additional documentary evidence submitted prior to the hearing. With respect to demonstratives, the Seventh Procedural Order states:

"Demonstratives are generally limited to enlargements of exhibits (maps, photographs, tables, etc) that are already part of the record of the proceeding. Demonstratives should be clearly labeled. Demonstratives are generally not admitted as evidence.

Any proposed demonstratives that are compilations of data in the form of charts, tables, graphs, etc. taken from various documents in the record must be clearly labeled as to source and must be provided to the other parties a minimum of two weeks prior to the hearing for review by the parties.

The use of powerpoint or other presentation technologies at the hearing is limited to text summary of the main points of a witness' testimony and/or enlargement and projection of an exhibit included in the pre-filed testimony or a previously approved demonstrative.

A proposed demonstrative may be used at the hearing only with the permission of the Presiding Officer."

The deadline for submission of demonstratives including powerpoint presentations is Monday, January 11, 2009 at 4:00 pm.

5. **Witness Issues.** Mallinckrodt's request for state agency staff to appear at the hearing was discussed. The Commissioner confirmed that all DEP staff that have been requested by Mallinckrodt will appear at the hearing. With respect to state agency staff not currently employed by the Department, the Commissioner stated that they have contacted David Maxwell and would contact Dawn Gallagher and Dick Davies to request their appearance at the hearing. A deadline of

December 23, 2009 was set for the Commissioner to report on the availability of these witnesses. By electronic mail on December 21, 2009, the Commissioner confirmed that David Maxwell is available the week of February 1-5; Dawn Gallagher is available February 1-4; and Dick Davies is available on February 1 and February 5.

6. **Hearing Schedule.** In a letter dated December 17, 2009, Mallinckrodt expressed concern that the two weeks allocated for the hearing would not be sufficient and requested that the Board reserve an additional ten days for the hearing. The Town of Orrington and the Maine People's Alliance indicated that it would be advisable to set aside additional days as a contingency, especially given that the hearing will occur during the winter. The Commissioner stated that the allotted two weeks should be sufficient to conduct the hearing, but supported the identification of backup dates in the event of weather cancelations. Both the Town of Orrington and Maine People's Alliance stated that they do not anticipate that they will require much time to cross-examine witnesses of the other parties.

Response: The Board has indicated for a number of months that it would allocate two weeks for the hearing. The parties have pre-filed both direct and rebuttal testimony. As previously discussed, direct testimony by the parties will be limited to a summary of pre-filed testimony, with sur-rebuttal of other parties' pre-filed rebuttal testimony woven in as necessary. The bulk of the hearing will be devoted to cross-examination of the witnesses and questions from Board members and staff. The parties are encouraged to focus their presentation time and cross-examination on the issues the Board must decide. As set forth in the Eighth Procedural Order (Section 1, pages 2-3),

[T]he Commissioner has the burden of persuading the Board that the statutory elements of the Uncontrolled Sites Law are met, namely that:

1. "Hazardous substances are or were handled or otherwise came to be located" at a specific location,
2. The hazardous substances at the location "may create a danger to the public health, to the safety of any person or to the environment,"
3. The ordered remedial action is "necessary to terminate or mitigate the danger or likelihood of danger," and
4. The persons to whom the order is directed are "responsible parties".

It is not necessary to spend a significant amount of time at the hearing on matters such as the history of the site. The Board will identify backup dates in the event of cancelation due to weather conditions.

7. **Hearing Organization.** The first week of the hearing will be devoted largely to brief opening statements, the Commissioner's witnesses and cross thereof, and an evening session in Orrington. The second week of the hearing will be devoted largely to Mallinckrodt's witnesses and cross thereof, and the Town's witness. MPA's witnesses will appear during the evening session in Orrington. The Board reiterated its desire for the parties to present their witnesses in panel format where possible. The Board will develop a general schedule for the hearing.

Ruling: Parties shall submit information on the sequence of presentation of witnesses and issues, composition of proposed witness panels, and the amount of time requested for a summary presentation of testimony and cross-examination of various witnesses by Monday, January 4, 2010 at 4:00 pm. A draft hearing schedule will be distributed to parties for review and comment.

8. Other

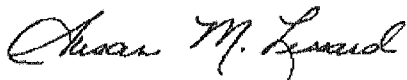
- A. Hearing Session in Orrington. The portion of the hearing reserved for testimony from the general public will be held on Thursday, January 28, 2010.
- B. Hearing Notice. The Board will publish notice of the hearing in accordance with the Maine Administrative Procedure Act. The Town of Orrington requested permission to publish notice of the hearing. There was no objection to the Town reprinting or posting the Board's notice of the hearing.
- C. Hearing Transcript. The parties asked about the availability of a non-certified transcript for use by the parties during the hearing. The Board's contract with the court reporter does not require that a non-certified copy be provided, and the court reporter is unwilling to provide a copy that has not been proofread and certified.
- D. Information Requests. The Commissioner requested that Mallinckrodt provide the dates of the analytical data included in the pre-filed testimony of witnesses Sevee, Vaillancourt, and Chaffee and the corporate information cited in the testimony of Kathryn Zeigler. Mallinckrodt indicated that it would review the Commissioner's information needs with Mr. LaFond.
- E. Hearing Logistics. Information on the room layout was shared with the parties. Parties were asked to coordinate meal plans with the Board's Administrative Assistant. Parties were also reminded that they are responsible for their own audio/visual needs except that the Board will provide microphones and a projection screen.
- F. Procedural Reminders. Parties were reminded that they must present their witnesses during the allotted time and not during the portion of the hearing reserved for testimony from the general public, except that Maine People's Alliance will present its witnesses during the first portion of the evening session in Orrington. In accordance with the Procedures Document: Appeal of Designation of Uncontrolled Hazardous Substance Site and Order, HoltraChem Facility, Orrington, Maine, July 1, 2009 (Addendum to the Fourth Procedural Order), parties were reminded that witnesses must be physically present at the hearing (Sec. 6C), the Presiding Officer may regulate certain devices (Sec. 10), at the conclusion of the hearing the record will close unless left open by the Presiding Officer for a specific purpose (Sec. 13), the parties will have an opportunity to present proposed briefs and findings (Sec. 15), the issue of oral closing statements will be decided at the close of the hearing (Sec. 16), and parties were asked to remind their witnesses of the prohibition on ex parte communications (Sec. 19).

9. Schedule. The following deadlines were established at the conference:

- December 23, 2009. Deadline for responses to motions to strike certain testimony. Deadline for submission of any additional exhibits including stand alone exhibits and exhibits to be used on cross-examination that have not already been filed. Deadline for the Commissioner to report on the availability of state agency staff not employed by the Department of Environmental Protection.
- January 4, 2010. Deadline for submittal of information regarding hearing schedule including sequence of presentation of witnesses and issues, composition of proposed witness panels, amount of time requested for summary presentation of testimony and cross-examination of various witnesses consistent with a two week hearing.
- January 5, 2010. Deadline for any appeal of Eleventh Procedural Order. The appealing party need only submit notice of its appeal, additional argument is not necessary.
- January 7, 2010. Any appeal of the Eleventh Procedural Order will be considered by the Board at its January 7th Board meeting.
- January 11, 2010. Submission of demonstratives, including powerpoint presentations.
- January 12, 2010. The parties shall reserve this date for a pre-hearing conference at 9:00 am.
- Weeks of January 25, 2010 and February 1, 2010. Public Hearing.

DONE AND DATED AT AUGUSTA, MAINE THIS 30TH DAY OF DECEMBER, 2009.

BOARD OF ENVIRONMENTAL PROTECTION



BY:

Susan M. Lessard, Chair